Neutral Citation Number: [2021] EWCA Civ 1858

Case No: C3/2021/0390

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(LANDS CHAMBER)
Judge Elizabeth Cooke and Mrs Diane Martin MRICS FAAV
[2020] UKUT 348 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2021

Before:

LORD JUSTICE NEWEY
LORD JUSTICE DINGEMANS
and
LADY JUSTICE WHIPPLE

- -

Between:

ON TOWER UK LIMITED	**Claimant/ Respondent**
- and -	
J.H. & F.W. GREEN LIMITED	**Respondent/ Appellant**

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- -

Christopher Pymont QC and Wayne Clark (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellant, J.H. & F.W. Green Limited**
Oliver Radley-Gardner QC and Justin Kitson (instructed by **Pinsent Masons LLP**) for the **Respondent, On Tower UK Limited**

Hearing date: 18 November 2021

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Approved Judgment

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Lord Justice Newey:

1. This appeal from the Upper Tribunal (Lands Chamber) concerns the terms of an agreement which is to be imposed on the parties pursuant to the electronic communications code contained in schedule 3A to the Communications Act 2003 ("the Code"). More specifically, it relates to the extent of the upgrading and sharing rights which the respondent, On Tower UK Limited ("On Tower"), should enjoy under that agreement.

Basic facts

2. The appellant, J.H. & F.W. Green Limited ("J.H. & F.W. Green"), is the freehold owner of Dale Park Estate, Madehurst, West Sussex ("the Estate"). The Estate includes 39 residential properties as well as more than 2,000 acres of agricultural land, farm buildings and woodland.

3. In 1999, J.H. & F.W. Green granted EE Limited (then known as "One 2 One Personal Communications Limited") a 20-year lease of a small woodland site in the Estate with a view to its being used to accommodate a telecommunications mast. The site is reached via a 0.8 mile road or track from the public highway and is within the South Downs National Park.

4. The lease gave the tenant the right "to install the Equipment upon or within the Premises and thereafter to inspect maintain and adjust repair alter renew and use the same for the Permitted Purpose". "Equipment" was defined to mean "the Antennae and associated ground equipment as shall from time to time be installed in or upon the Premises or the Owner's Property pursuant to this Lease" and "Antennae" to refer to "three cross polar antennae and two dish antennae together with any pole mount or other structural steel work supporting such antennae". The tenant was entitled to place such additional antennae on the site as might be required in the exercise of the rights granted by the lease, but only with the landlord's consent, which however was not to be unreasonably withheld. The tenant could also, without having to obtain the landlord's consent, install or alter equipment "within the Equipment Accommodation", the "Equipment Accommodation" being "the equipment container or containers to be erected upon the Premises pursuant to this Lease". The lease further enabled the tenant to grant a third party rights to share the occupation of the site for the purposes of telecommunications activities, but on the basis that the landlord was to be paid 30% of sums received from the third party, with a minimum of £1,000 per annum.

5. The lease has been held by On Tower since 2000. The site nowadays houses a 22.5 metre tower, two panel antennae, three dish antennae and two equipment cabins.

6. On Tower is a wholesale infrastructure provider (or "WIP") and an "operator" within the meaning of paragraph 2 of the Code. It is not itself a mobile network operator, but it provides infrastructure such as masts and cabinets for the use of mobile network operators and other communication providers. As the Tribunal said in paragraph 5 of its decision, "the network operators' equipment, such as fibre and antennae, brings [On Tower's equipment] to life and creates electronic communications networks". Unlike some other infrastructure providers, On Tower is not owned by any network

operator and makes its apparatus available to network operators generally on a neutral basis.

7. According to its terms, the lease was due to expire on 16 March 2019. However, it was then continued by paragraph 30 of the Code.

8. By a notice dated 1 May 2019, On Tower claimed a new lease of the site. Towards the end of that year, the parties not having reached agreement, On Tower applied to the Upper Tribunal pursuant to paragraph 33(5) of the Code for an order under paragraph 34. On Tower asked for an order pursuant to paragraph 34(6) terminating the 1999 lease and requiring the parties to enter into a new agreement conferring "code rights", as defined in the Code, on it.

9. While J.H. & F.W. Green would have preferred On Tower to leave the Estate or at least to move its mast to an alternative location within the Estate, it accepted that On Tower was entitled to a new agreement in respect of the existing site. By the time of the hearing before the Tribunal, the parties had agreed that On Tower would be granted a 10-year agreement and on many of its terms. The matters on which they differed concerned equipment, upgrading and sharing.

10. The Tribunal (Judge Elizabeth Cooke and Mrs Diane Martin MRICS and FAAV) summarised what was at issue as follows:

> "27. There are three terms in dispute. The first is about equipment; the rights to install and keep electronic communications apparatus ('ECA') on land are Code rights (paragraph 3(a) and (b) of the Code …). The claimant [i.e. On Tower] wants the agreement to grant the right to install and keep on site any ECA, whereas the respondent [i.e. J.H. & F.W. Green] wants the agreement to permit the claimant to install and keep specified equipment on the land, with the agreement listing the ECA that is on site now so that there is no right to add or substitute any other ECA.
>
> 28. The second and third disputes are very similar; the claimant wants the right to upgrade its equipment, without qualification, and to share its equipment with mobile network operators, without qualification. The right to upgrade equipment is also a Code right (paragraph 3(c)). The respondent is willing to grant the rights to share and upgrade but wants both rights to exist only on the two conditions set out in paragraph 17(2) and (3) of the Code …."

11. As the Tribunal noted in paragraph 32 of its decision, the issues were interrelated:

> "[J.H. & F.W. Green's] requirement for a list of equipment is linked to its stance about upgrading: it needs to know what is on site at the outset so that it can tell whether equipment has been upgraded and whether the conditions in paragraph 17 have been met. Indeed the two terms go together; unless the parties are to indulge in a pointless dispute about what is an upgrade

> and what is an extra piece of kit, there is little point in having any limitation on the right to upgrade if there is no limitation on the right to add or change the equipment, and vice versa."

12. The Tribunal decided the disputed points in favour of On Tower, concluding that the agreement to be imposed on the parties should include the upgrading and sharing rights which On Tower had sought. The Tribunal further determined that On Tower should pay J.H. & F.W. Green £1,200 per annum by way of consideration under the new agreement. After noting in paragraph 138 of its decision that a "particular concern of [J.H. & F.W. Green] is the shadow of the future upgrade activity, involving the installation of new ECA which cannot currently be specified, and which may (or may not) be bigger, more powerful, noisier, more unsightly, and involve a taller mast", the Tribunal said in paragraph 139:

> "We consider that for this site, with its particular attributes, the adjustment to be made for the adverse effects on [J.H. & F.W. Green] of regular access by sharers of the site, of the occasional use of a generator, of increased access during upgrading activities, and of loss of amenity resulting from the new mast itself, should be £500 per annum."

13. J.H. & F.W. Green now challenges the Tribunal's decision as regards upgrading and sharing rights.

The Code

14. Schedule 3A to the Communications Act 2003 ("the 2003 Act"), comprising the Code, was inserted into the 2003 Act by the Digital Economy Act 2017, replacing the code set out in schedule 2 to the Telecommunications Act 1984 (as amended latterly by the 2003 Act).

15. The Code deals with the relationship between, on the one hand, "operators" and, on the other, "occupiers" of land which operators wish to use. A person can be designated as an "operator" either for "the purposes of the provision by him of an electronic communications network" or for "the purposes of the provision by him of a system of infrastructure which he is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks": see section 106 of the 2003 Act and paragraph 2 of the Code. In other words, the Code can be applied not only to a network provider but to an entity such as On Tower which supplies infrastructure in support of networks without itself providing one.

16. Among other things, the Code makes provision for "code rights" to be conferred on operators. By paragraph 3 of the Code, a "code right":

> "in relation to an operator and any land, is a right for the statutory purposes—
>
> (a) to install electronic communications apparatus on, under or over the land,

> (b) to keep installed electronic communications apparatus which is on, under or over the land,
>
> (c) to inspect, maintain, adjust, alter, repair, upgrade or operate electronic communications apparatus which is on, under or over the land,
>
> (d) to carry out any works on the land for or in connection with the installation of electronic communications apparatus on, under or over the land or elsewhere,
>
> (e) to carry out any works on the land for or in connection with the maintenance, adjustment, alteration, repair, upgrading or operation of electronic communications apparatus which is on, under or over the land or elsewhere,
>
> (f) to enter the land to inspect, maintain, adjust, alter, repair, upgrade or operate any electronic communications apparatus which is on, under or over the land or elsewhere,
>
> (g) to connect to a power supply,
>
> (h) to interfere with or obstruct a means of access to or from the land (whether or not any electronic communications apparatus is on, under or over the land), or
>
> (i) to lop or cut back, or require another person to lop or cut back, any tree or other vegetation that interferes or will or may interfere with electronic communications apparatus."

The "statutory purposes" are "the purposes of providing the operator's network" or "the purposes of providing an infrastructure system": see paragraph 4 of the Code.

17. As its heading ("Power of Court to impose agreement") indicates, Part 4 of the Code, comprising paragraphs 19-27, is concerned with circumstances in which an agreement conferring code rights can be imposed by the Tribunal (the jurisdiction of the Court under the Code being exercised by the Tribunal). Paragraph 20 allows an operator requiring a code right to apply for an order conferring it in the absence of agreement. By paragraph 21, the Tribunal may make such an order if the two conditions specified in sub-paragraphs (2) and (3) are met. Sub-paragraphs (2) and (3) state:

> "(2) The first condition is that the prejudice caused to the relevant person by the order is capable of being adequately compensated by money.
>
> (3) The second condition is that the public benefit likely to result from the making of the order outweighs the prejudice to the relevant person."

Sub-paragraph (4) explains that, in deciding whether the second condition is met, the Tribunal must have regard to the public interest in access to a choice of high quality electronic communications services.

18. Paragraph 23(1) of the Code states that "[a]n order under paragraph 20 may impose an agreement which gives effect to the code rights sought by the operator with such modifications as the court thinks fit". By paragraph 23(2), an order under paragraph 20 "must require the agreement to contain such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8)". Sub-paragraph (5) stipulates that any agreement imposed by the Tribunal must include the terms the Tribunal thinks appropriate:

> "for ensuring that the least possible loss and damage is caused by the exercise of the code right to persons who—
>
> (a) occupy the land in question,
>
> (b) own interests in that land, or
>
> (c) are from time to time on that land".

19. Paragraph 24 of the Code provides for the amount of consideration payable by an operator under an agreement imposed under paragraph 20 to be "an amount or amounts representing the market value of the relevant person's agreement to confer or be bound by the code right (as the case may be)". By paragraph 24(3), however, the market value is to be assessed on, among others, the assumptions that "the right that the transaction relates to does not relate to the provision or use of an electronic communications network" and that "paragraphs 16 and 17 (assignment, and upgrading and sharing) do not apply to the right or any apparatus to which it could apply". In this connection, the explanatory notes to the Digital Economy Act 2017 explained that the Act involved "moving to a 'no scheme' valuation regime that ensures property owners will be fairly compensated for use of their land, but restricts their ability to profit from the public need for communications infrastructure" (paragraph 14) and that "[t]he value of the rights contained in paragraphs 16 and 17, which relate to the assignment of an agreement or to upgrading and sharing apparatus, is specifically excluded from the assessment of market value, to ensure that no 'premium' is added for rights conferred by statute, not by agreement" (paragraph 420). The Department for Culture Media & Sport's May 2016 publication, "A New Electronic Communications Code", had said at page 15 that site providers "should get fair value for the use of their land" but that this "should not, as a matter of principle, include a share of the economic value created by the very high public demand for services that the operator provides" and that a "no scheme" rate "is more relevant to the nature of modern digital communications infrastructure rollout, and will work to encourage greater investment and improved network coverage".

20. In this respect, the Code differs from what the Law Commission had recommended in its 2013 report, "The Electronic Communications Code" (Law Com No 336). As the Law Commission explained in paragraph 5.76 of its report, its consultation had "not produced evidence that could justify our recommending a 'no-scheme' pricing basis in the public interest". With regard to rights to share or upgrade equipment, the Law Commission said in paragraph 3.42, "Such rights must be negotiated for, or granted

by the tribunal; it may be right for there to be additional consideration payable, depending upon the market itself."

21. As its heading says, Part 5 of the Code, comprising paragraphs 28-35, addresses "Termination and modification of agreements". By paragraph 30, an operator continues to be entitled to exercise a code right conferred by an agreement even after the agreement would have terminated according to its terms. A site provider may, however, seek to bring such an agreement to an end by serving a notice under paragraph 31 on, among others, the ground that "the operator is not entitled to the code agreement because the test under paragraph 21 for the imposition of the agreement on the site provider is not met". It is also possible for either an operator or a site provider to apply for an agreement to be modified or replaced pursuant to paragraph 33. Where a notice is given under that paragraph and the parties have not reached agreement on the proposals in the notice six months later, the operator or site provider may apply to the Tribunal for an order to be made under paragraph 34: see paragraph 33(5).

22. Paragraph 34 of the Code provides as follows:

> "(1) This paragraph sets out the orders that the court may make on an application under paragraph 32(1)(b) or 33(5).
>
> (2) The court may order that the operator may continue to exercise the existing code right in accordance with the existing code agreement for such period as may be specified in the order (so that the code agreement has effect accordingly).
>
> (3) The court may order the modification of the terms of the code agreement relating to the existing code right.
>
> (4) Where under the code agreement more than one code right is conferred by or otherwise binds the site provider, the court may order the modification of the terms of the code agreement so that it no longer provides for an existing code right to be conferred by or otherwise bind the site provider.
>
> (5) The court may order the terms of the code agreement relating to the existing code right to be modified so that—
>
> (a) it confers an additional code right on the operator, or
>
> (b) it provides that the site provider is otherwise bound by an additional code right.
>
> (6) The court may order the termination of the code agreement relating to the existing code right and order

the operator and the site provider to enter into a new agreement which—

(a) confers a code right on the operator, or

(b) provides for a code right to bind the site provider.

(7) The existing code agreement continues until the new agreement takes effect.

(8) This code applies to the new agreement as if it were an agreement under Part 2 of this code.

(9) The terms conferring or providing for an additional code right under sub-paragraph (5), and the terms of a new agreement under sub-paragraph (6), are to be such as are agreed between the operator and the site provider.

(10) If the operator and the site provider are unable to agree on the terms, the court must on an application by either party make an order specifying those terms.

(11) Paragraphs 23(2) to (8), 24, 25 and 84 apply—

(a) to an order under sub-paragraph (3), (4) or (5), so far as it modifies or specifies the terms of the agreement, and

(b) to an order under sub-paragraph (10)

as they apply to an order under paragraph 20.

(12) In the case of an order under sub-paragraph (10) the court must also have regard to the terms of the existing code agreement.

(13) In determining which order to make under this paragraph, the court must have regard to all the circumstances of the case, and in particular to—

(a) the operator's business and technical needs,

(b) the use that the site provider is making of the land to which the existing code agreement relates,

(c) any duties imposed on the site provider by an enactment, and

> (d) the amount of consideration payable by the operator to the site provider under the existing code agreement …."

23. Part 3 of the Code, headed "Assignment of code rights, and upgrading and sharing of apparatus" and comprising paragraphs 15-18, is also important in the context of this appeal. It applies to all agreements conferring code rights and, as explained in paragraph 15, makes provision for operators to assign such agreements, to upgrade electronic communications apparatus to which such an agreement relates and to share the use of any such electronic communications apparatus. The explanatory notes to the Digital Economy Act 2017 explained that the Government "intends infrastructure sharing to assist future deployment of technology such as 5G".

24. Paragraph 17 is in these terms:

> "(1) An operator ('the main operator') who has entered into an agreement under Part 2 of this code [i.e. an agreement conferring code rights] may, if the conditions in sub-paragraphs (2) and (3) are met—
>
> (a) upgrade the electronic communications apparatus to which the agreement relates, or
>
> (b) share the use of such electronic communications apparatus with another operator.
>
> (2) The first condition is that any changes as a result of the upgrading or sharing to the electronic communications apparatus to which the agreement relates have no adverse impact, or no more than a minimal adverse impact, on its appearance.
>
> (3) The second condition is that the upgrading or sharing imposes no additional burden on the other party to the agreement.
>
> (4) For the purposes of sub-paragraph (3) an additional burden includes anything that—
>
> (a) has an additional adverse effect on the other party's enjoyment of the land, or
>
> (b) causes additional loss, damage or expense to that party.
>
> (5) Any agreement under Part 2 of this code is void to the extent that—
>
> (a) it prevents or limits the upgrading or sharing, in a case where the conditions in sub-paragraphs (2) and (3) are met, of the electronic communications apparatus to which the agreement relates, or

> (b) it makes upgrading or sharing of such apparatus subject to conditions to be met by the operator (including a condition requiring the payment of money).
>
> (6) References in this paragraph to sharing electronic communications apparatus include carrying out works to the apparatus to enable such sharing to take place."

25. Finally, it is to be noted that, where a code agreement is imposed, paragraph 25 of the Code entitles the site provider to compensation "for any loss or damage that has been sustained or will be sustained by that person as a result of the exercise of the code right to which the order relates". Such compensation falls to be assessed in accordance with paragraph 84.

The Tribunal decision

26. The Tribunal distinguished between, on the one hand, rights to install and keep electronic communications apparatus on site and to upgrade (which, the Tribunal noted, are code rights within paragraph 3 of the Code) and, on the other hand, sharing. With regard to the former, the Tribunal said in paragraph 49 that its understanding of the Code was that "the Tribunal may (not 'must', so there is a discretion) confer a Code right on the claimant provided that the conditions set out in paragraph 21 are met". With regard to those conditions, the Tribunal was "unimpressed" by the suggestion that a new mast could be "hundreds of metres tall, and that safety regulations could require it to be festooned with lights and covered in dayglo paint to prevent aircraft from flying into it", commenting in paragraph 51 that that sort of scenario is "as practically impossible as it is implausible". The Tribunal took seriously concerns which had been expressed about traffic, noise, security and the visual intrusion of a taller mast, observing, "There are bound to be such worries; the advance of technology creates a practical need for [On Tower] and an alarmingly unknown future for [J.H. & F.W. Green]". However, the Tribunal thought that alarm "exaggerated" (paragraph 52) and that J.H. & F.W. Green's witnesses had paid "little regard to the provisions of the agreement", the terms of which "forbid [On Tower] to cause a nuisance to [J.H. & F.W. Green] or to cause it loss or injury" (paragraph 53).

27. The Tribunal went on:

> "55. [On Tower's] evidence of the public benefit of what it seeks is unchallenged, and there is no basis on which we could conclude that it is outweighed by the limited prejudice that J.H. & F.W. Green] is able to show. Moreover that prejudice can be compensated by money. [J.H. & F.W. Green] is a limited company so will not itself suffer from noise or inconvenience, but it has responsibilities to its tenants and has its own farming activities; all the difficulties anticipated can be addressed by communication with [On Tower] and if they cannot be resolved they would all appear to be able to be compensated. By contrast the difficulties that a limit on equipment or on upgrading would cause [On Tower] are extensive; the requirement to negotiate, outside the protection of the Code (because of the effect of

> *Compton Beauchamp* …), for permission for every new antenna (etc) would be an expensive and time-consuming burden for it to sustain.
>
> 56. Accordingly the conditions in paragraph 21 are met and the Tribunal may impose these rights. Should it modify them in light of the need to cause the least possible loss and damage to [J.H. & F.W. Green]? We think not. There are ample protections in the agreement, combined with the control exercised by the local planning authority and the extra protection afforded in the National Park ….”

28. Turning to sharing, the Tribunal said this:

> “59. As with upgrading, paragraph 17 operates as a floor; these are the minimum rights that an operator is to have. It was the Law Commission’s intention that if the claimant was to have any more extensive right to share it would have to be paid for, and that has turned out to be a more limited right than the Law Commission intended. But the right to compensation for any loss or damage caused by more extensive sharing rights remains.
>
> 60. But on what basis can the operator claim more extensive sharing rights than are provided for in paragraph 17? The reasoning we adopted in connection with the right to install equipment and the right to upgrade will not assist here because the right to share is not a Code right. Instead the Tribunal has a discretion whether or not to impose such a term, subject to the constraint of paragraph 23(5).
>
> 61. That does not mean that if the right to share without limitation will cause loss or damage it will be not imposed; it may be modified to minimise damage, or the Tribunal may impose it but also impose other terms, if needed, to minimise loss or damage in accordance with paragraph 23(5). In making that choice it may be helpful to think in terms of a balancing process between the claimant’s requirements and the respondent's concerns, but the Code does not put it like that. Perhaps a better way to look at it is as follows.
>
> 62. First, the Tribunal should consider the term the operator seeks and the reason why it needs the term in question in order to pursue the business for whose purposes it received its Ofcom direction and in light of the public interest in a choice of high quality telecommunications services.
>
> 63. Second, the Tribunal will consider the concerns or objections raised by the respondent and whether in order to minimise loss or damage in accordance with paragraph 23(5)

> the term should not be imposed, or should be imposed to a limited or qualified extent.
>
> 64. If those concerns do not prevent the imposition of the term and do not require its qualification, then the Tribunal will consider whether, in imposing that term, it should also impose further terms to minimise loss or damage.
>
> 65. With that in mind, we turn to the unlimited right to share that [On Tower] seeks.
>
> 66. In the present case the answer to the first question is very clear: without the ability to share [On Tower] is out of business and cannot fulfil its statutory purpose …. Moreover as a neutral host it needs an unrestricted right to share; there is no case for restricting that right to any particular network operator or to a specified number of operators …. To limit that right by reference to the conditions in paragraph 17 would be very onerous for [On Tower].
>
> 67. Our views on the second will be clear from what we have already said. However genuine [J.H. & F.W. Green's] concerns, they are not really reflected in reality nor founded on evidence. The agreement, and planning law, provide the protection that [J.H. & F.W. Green] needs from the levels of nuisance and disturbance that can realistically be anticipated. The particular concern about sharing is the presence of unknown persons on the site, but the site is shared already and that has had so little impact that Mr Rupert Green was at the time he made his first witness statement unaware that the site was shared …. The conditions set out in paragraph 17 are not needed in view of the safeguards built into the agreement and the availability of compensation."

29. The Tribunal accordingly concluded that On Tower should have unrestricted rights to install, upgrade and share.

Issues

30. The issues raised by the appeal can be considered under the following headings:

    i) General approach

    ii) The significance of paragraph 34(12) of the Code

    iii) The significance of paragraph 17 of the Code

General approach

31. What was before the Tribunal was an application for the 1999 lease, as continued under paragraph 30 of the Code, to be terminated and replaced by a new agreement pursuant to paragraph 34(6). Paragraph 34(9) provides for the terms of a new

agreement under paragraph 34(6) to be such as are agreed between the operator and the site provider and, by paragraph 34(10), the Tribunal "must … make an order specifying those terms" if the parties cannot agree. In such a case, paragraph 34(11) states that "[p]aragraphs 23(2) to (8), 24, 25 and 84 apply … as they apply to an order under paragraph 20". Further, paragraph 34(12) stipulates that the Tribunal "must also have regard to the terms of the existing code agreement" and paragraph 34(13) directs the Tribunal, in determining which order to make under paragraph 34, to "have regard to all the circumstances of the case" and in particular to:

> "(a) the operator's business and technical needs,
>
> (b) the use that the site provider is making of the land to which the existing code agreement relates,
>
> (c) any duties imposed on the site provider by an enactment, and
>
> (d) the amount of consideration payable by the operator to the site provider under the existing code agreement".

However, where, as in the present case, the existing code agreement pre-dates the Code, sub-paragraph (13)(d) does not apply: see paragraph 7(4) of the transitional provisions to be found in schedule 2 to the Digital Economy Act 2017.

32. It is to be noted that, in the context of an application for the replacement of a code agreement under Part 5 of the Code, the Tribunal is not directed to have regard to the conditions set out in paragraph 21, nor to paragraph 23(1). On the other hand, the Tribunal is told to have regard to paragraph 23(5), quoted in paragraph 18 above.

33. There is, however, no mention of paragraph 34 of the Code in the section of Tribunal's decision dealing with whether On Tower should be granted the upgrading and sharing rights it was asking for. In contrast, the Tribunal explained in paragraph 49 of its decision that it was its understanding that the Tribunal could confer a code right on On Tower provided that the conditions set out in paragraph 21 of the Code were met, and it proceeded to consider these conditions in paragraphs 51-56 of the decision. The Tribunal also cited paragraph 23(1) of the Code, saying in paragraph 50 of the decision that the Tribunal "may, by the agreement which it imposes, give effect to the code right sought by the operator with such modifications as it thinks appropriate (paragraph 23(1))".

34. In the circumstances, Mr Christopher Pymont QC, who appeared for J.H. & F.W. Green with Mr Wayne Clark, submitted that the Tribunal had applied the wrong part of the Code. It had approached On Tower's application as if it had been made under Part 4 when it had in fact been made under Part 5 and so had applied paragraph 21 instead of paragraph 34. As a result, the Tribunal had adopted the wrong starting position, assuming that, at least as regards the right to upgrade (being a code right), the right On Tower asked for should be granted "subject to such modifications as the court thinks appropriate" (by reference to paragraph 23(1)) and that modifications would be appropriate only where necessary to cause the least possible damage to J.H. & F.W. Green (in the light of paragraph 23(5)). The Tribunal's reasoning, so it was said, was "infected" by its erroneous application of paragraph 21, and, overlooking

the importance of paragraph 34, the Tribunal left out of account the matters mentioned in paragraphs 34(12) and (13).

35. I shall consider later in this judgment whether the Tribunal failed to recognise the significance of paragraph 34(12), and also paragraph 17, of the Code. Those issues apart, however, the fact that the Tribunal appears to have mistakenly treated On Tower's application as one under Part 4 of the Code does not seem to me to matter. In fact, as was argued by Mr Oliver Radley-Gardner QC, who appeared for On Tower with Mr Justin Kitson, the Tribunal's error was to the disadvantage of his client, not J.H. & F.W. Green. It meant that the Tribunal thought that the conditions set out in paragraph 21 had to be met for it to accede to On Tower's application when that was not in truth the case.

36. Mr Pymont suggested that the Tribunal had considered what terms should be included from the point of view of what "the operator wants" and that it had approached matters on the footing that, if the conditions in paragraph 21 of the Code were satisfied, On Tower should be granted what it sought subject only to "such modifications as the court thinks fit". I do not think there is any substance in such criticisms, however. Whether an application is made under Part 4 or under Part 5, the Tribunal is bound to address itself to what the operator is seeking. That does not mean that it will assume that the operator should be given what it asks for and, in the present case, the Tribunal expressly recorded in paragraph 49 of its decision that it was its understanding that it "may (not 'must', so there is a discretion)" confer a code right if the paragraph 21 conditions were met. The Tribunal also noted, in paragraph 48, that it was common ground that "the fact that a claimant wants a right does not mean that it automatically has to have it" and that "the Tribunal has a judicial discretion as to the terms of the agreement and must engage in a balancing exercise between the needs of the parties". It is true that the Tribunal incorrectly quoted paragraph 23(1) ("An order under paragraph 20 may impose an agreement which gives effect to the code right sought by the operator with such modifications as the court thinks appropriate") when paragraphs 34(6) and (10) were in fact in point, but the latter provisions were to similar effect. Paragraph 34(6) empowers the Court to order the parties to enter into a new agreement and paragraph 34(10) states that, if the parties are unable to agree the terms, "the court must … make an order specifying those terms".

37. Mr Pymont pointed out that paragraph 23(5) of the Code was the only "constraint" to which the Tribunal referred in paragraph 60 of its decision, where the Tribunal observed that it had a discretion whether or not to impose a term giving sharing rights beyond those for which paragraph 17 provides "subject to the constraint of paragraph 23(5)". However, paragraph 23(5) could fairly be described as a "constraint" and paragraph 34(11) states that it is to apply in relation to an order under paragraph 34(10). With regard to the other provisions which paragraph 34(11) identifies as applicable to an order under paragraph 34(10), paragraph 23(2) merely provides for the agreement "to contain such terms as the court thinks appropriate, subject to sub-paragraphs (3) to (8)", and there is no suggestion that paragraphs 23(2A)-(4) and (6)-(8), 24, 25 and 84 were of importance in relation to the grant of upgrading and sharing rights in this case.

38. Nor can it be said that the Tribunal overlooked matters identified in paragraph 34(13) of the Code. The sub-paragraphs of potential relevance were (13)(a) and (b) ("the

operator's business and technical needs" and "the use that the site provider is making of the land to which the existing code agreement relates") and the decision covers both.

39. The upshot, I think, is that the real questions raised by this appeal concern paragraphs 17 and 34(12) of the Code. It may be unfortunate that the Tribunal approached On Tower's application as if it were made under Part 4, but the error does not of itself provide a basis for overturning its decision.

The significance of paragraph 34(12) of the Code

40. Paragraph 34(12) of the Code reads:

> "In the case of an order under sub-paragraph (10) the court must also have regard to the terms of the existing code agreement."

41. Mr Pymont argued that this wording is similar to, and modelled on, that to be found in section 35 of the Landlord and Tenant Act 1954 and that it must be construed in a similar way.

42. The Landlord and Tenant Act 1954 allows a tenant of business premises to apply to the Court for a new tenancy. By section 35(1) of the Act:

> "The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder) … shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

43. Section 35 of the 1954 Act was the subject of consideration by the House of Lords in *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726 ("*O'May*"). In that case, it was the landlord's wish, for respectable reasons, that the new lease which a tenant was to be granted under the Act should differ from its predecessor in relation to repairing obligations and service charges. The House of Lords declined to sanction the change. Having observed at 740 that "in deciding the terms of the new tenancy, as to which its discretion is otherwise not expressly fettered, the court must start by 'having regard to' the terms of the current tenancy, which ex hypothesi must either have been originally the subject of agreement between the parties, or themselves the result of a previous determination by the court in earlier proceedings for renewal", Lord Hailsham went on at 740-741:

> "A certain amount of discussion took place in argument as to the meaning of 'having regard to' in section 35. Despite the fact that the phrase has only just been used by the draftsman of section 34 in an almost mandatory sense, I do not in any way suggest that the court is intended, or should in any way attempt to bind the parties to the terms of the current tenancy in any permanent form. But I do believe that the court must begin by

> considering the terms of the current tenancy, that the burden of persuading the court to impose a change in those terms against the will of either party must rest on the party proposing the change, and that the change proposed must, in the circumstances of the case, be fair and reasonable, and should take into account, amongst other things, the comparatively weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity, and the general purpose of the Act which is to protect the business interests of the tenant so far as they are affected by the approaching termination of the current lease, in particular as regards his security of tenure ….
>
> A further point which was canvassed in argument, and with which I agree, is that the discretion of the court to accept or reject terms not in the current lease is not limited to the security of tenure of the tenant even in the extended sense referred to by Denning L.J. in *Gold v. Brighton Corporation* [1956] 1 W.L.R. 1291. There must, in my view, be a good reason based in the absence of agreement on essential fairness for the court to impose a new term not in the current lease by either party on the other against his will. Any other conclusion would in my view be inconsistent with the terms of the section. But, subject to this, the discretion of the court is of the widest possible kind, having regard to the almost infinitely varying circumstances of individual leases, properties, businesses and parties involved in business tenancies all over the country."

In a similar vein, Lord Wilberforce said of section 35 at 747:

> "This section contains a mandatory guideline or direction to 'have regard to' the terms of the current tenancy and to all relevant circumstances. The words 'have regard to' are elastic: they compel something between an obligation to reproduce existing terms and an unfettered right to substitute others. They impose an onus upon a party seeking to introduce new, or substituted, or modified terms, to justify the change, with reasons appearing sufficient to the court (see *Gold v. Brighton Corporation* [1956] 1 W.L.R. 1291, 1294 - on 'strong and cogent evidence' *per* Denning L.J., *Cardshops Ltd. v. Davies* [1971] 1 W.L.R. 591, 596 *per* Widgery L.J.)."

Lords Keith, Scarman and Brandon agreed.

44. As Mr Pymont pointed out, the Law Commission can be seen to have had in mind the Landlord and Tenant Act 1954, and section 35 in particular, when preparing its report. The Commission stated in paragraph 6.114 of the report:

> "We recommend that the revised Code should provide that the terms of a lease granted by order of the tribunal shall be such as may be agreed between the Site Provider and the Code Operator or as, in default of such agreement, may be

> determined by the tribunal; and in determining those terms the tribunal shall have regard to the terms of the current lease or other agreement and to all relevant circumstances."

The proposed wording mirrored that of section 35 of the 1954 Act and a footnote to paragraph 6.114 said, "Compare section 35 of the Landlord and Tenant Act 1954".

45. Lewison LJ touched on the significance of what has become paragraph 34(12) of the Code in *Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd* [2021] EWCA Civ 90, [2021] L&TR 14 ("*Ashloch*"). As Lewison LJ explained in paragraph 1 of his judgment, the question in that case was whether the Tribunal has jurisdiction to impose code rights over land in favour of an operator which is already in occupation of that same land under a tenancy granted before the Code came into force and which is continuing under section 24 of the Landlord and Tenant Act 1954. The Court of Appeal's answer was in the negative. In the course of his judgment, Lewison LJ said this:

> "101. There are a number of further difficulties which would arise if an operator in the position of Cornerstone had an unfettered right either to seek the imposition of an agreement under Pt 4 of the Code or to apply to renew its lease under Pt II of the 1954 Act. The Deputy President summarised them at [96]:
>
> > "Cornerstone's suggested operation of the Code would be even more astonishing in the case of a subsisting agreement to which Part 2 of the 1954 Act applies, which the Law Commission recommended should not obtain the benefits of the new Code retrospectively. Rather than making use of the right of renewal under the 1954 Act, which requires between six and twelve months' notice to be given under section 26(2) expiring after the end of the contractual term, the operator would have an unrestricted opportunity to give 28 days' notice under para.20. Having done so the operator would escape the provisions in section 34 of the 1954 Act for determining the rent under a new tenancy, which substantially replicate the open market, and would instead obtain access to the valuation assumptions in para.24 of the Code, including the no-network assumption which strips out the component of value referable to the intended use of the site as part of the operator's network. The operator would also escape the restrictions of section 34 of the 1954 Act, and those of para.34(12) of the Code, both of which make the terms of the existing tenancy or Code agreement the starting point when, in default of agreement, the Court or Tribunal is required to fix the terms on which new rights are to be enjoyed (see *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726). Instead the operator would have the benefit

> of paragraph 23(1)-(2) of the Code which requires the Tribunal to impose an agreement which gives effect to the Code right sought by the operator with such modifications and on such terms as the Tribunal thinks appropriate."

102. I agree."

46. Mr Pymont stressed the reference to paragraph 34(12) of the Code and section 35 of the Landlord and Tenant Act 1954 alike making the terms of the existing tenancy/agreement the starting point. However, in *EE Ltd v Stephenson* [2021] UKUT 167 (LC), [2021] 4 WLR 116, Fancourt J, sitting as the President of the Upper Tribunal (Lands Chamber), was cautious about comparisons between paragraph 34(12) of the Code and section 35 of the 1954 Act. After noting in paragraph 52 of the judgment that "[t]here can be no doubt that the structure and provisions of the Code are similar in various ways to Part 2 of the 1954 Act", Fancourt J said this:

> "53. However, the provisions of the Code are not in any respect exactly the same as those of Part II of the 1954 Act. One must be careful not to read in too much, based on superficial similarity of structure or language. The purpose underlying the 1954 Act was very different from that of the Code: to protect tenants of business premises from excessive costs, business interruption and loss of goodwill, by providing security of tenure while protecting the legitimate interests of landlords in recovering possession and receiving payment of a market rent. The purpose underlying the Code is to ensure that operators can use and exploit sites more flexibly, quickly and cheaply than had previously been the case, at lower than open market rents, in furtherance of the public interest of providing access to a choice of high quality electronic communications networks, while providing a degree of protection to site owners' legitimate interests. In both cases, there is an objective of providing security for the tenant/operator and continuity of operation.
>
> 54. Section 35 of the 1954 Act operates to limit changes in the terms of the tenancy (other than rent and duration) against the will of either party. This is an aspect of the provision of business continuity for the tenant, although it is sometimes the tenant who seeks the change. A heavy onus lies on the party seeking a change to justify it, in terms of overall fairness: *O'May*. Changes are readily justified where the law has changed: see *Cairnplace Ltd v CBL (Property Investment) Co Ltd* [1984] 1 WLR 696 and *Wallis Fashions Group Ltd v CGU Life Assurance* [2000] 81 P & CR 28. Changes may be justified where it is fair to both parties: see eg *Davy's of London (Wine Merchants) Ltd v City of London Corpn* [2004] EWHC 2224 (Ch); [2004] 3 EGLR 39 (terms of tenant break option where existing lease had none) and *Edwards & Walkden (Norfolk) Ltd v City of London Corpn* [2012] EWHC 2527

(Ch); [2013] 1 P & CR 10 (change from all-inclusive rent to rent plus variable service charge).

55. However, one objective of the Code was to change the terms that apply under code agreements, where these restrict operators from doing or having the flexibility to do what they reasonably need to do, or where they operate against the public interest. In the Code there is therefore not the same generally applied presumption against change that has been read into the language of section 35 of the 1954 Act. Rather, site providers are required to put up with a degree of change in the public interest of facilitating the provision of a choice of high quality networks.

56. Nevertheless, the words of paragraph 34(12) of the Code must have been intended to reflect the effect that the words have been held to have under the 1954 Act. The terms of the existing agreement are intended to be of some materiality, subject to the other considerations. The words of paragraph 34(12) are that the court shall *also* have regard to those terms. Read in context, this means that, in specifying the terms of the new code rights or the new agreement, regard is to be had to those terms as well as terms that the parties have agreed, if any, and the requirements of paragraphs 23(2) to (8), 24, 25 and 84 of the Code: paragraph 34(10), (11). These require a new code agreement to contain such terms as the court thinks appropriate, including for the payment of consideration in accordance with paragraph 24, compensation in accordance with paragraphs 25 and 84, terms for ensuring the least possible loss and damage caused to owners and occupiers (etc) by the exercise of code rights, and terms as to duration and the possible need for rights of termination and repositioning or temporary removal of equipment. The terms must also be consistent with paragraphs 16 and 17 of the Code.

57. Mr Pymont submitted that the *O'May* approach can accommodate these considerations, in that if an operator proves that the terms of the existing agreement will operate inconsistently with the Code, a change will be objectively fair and justified. I agree, as long as the justification is not to be identified in a narrow way, involving a site-specific need for the terms of the agreement to be changed. In the context of the Code, the terms of the existing agreement are only one matter to which the court is to have regard. Para 34(12) cannot be read as imposing an overarching restriction on change. Where the existing agreement is a subsisting agreement [i.e. one pre-dating the coming into force of the Code], it may well not contain terms that are appropriate in all the respects identified above, and there will therefore be a requirement to change them. If, on the other hand, the existing agreement is a new Part

> 2 agreement, it may contain terms that are appropriate in all these respects, in which case the terms of that agreement are likely to be of greater significance.
>
> 58. Despite the indication of this Tribunal and the Court of Appeal in *Ashloch* that an approach similar to that in *O'May* is suggested by the words of paragraph 34(12), there are other considerations in play under the Code, as compared with under the 1954 Act. The Court of Appeal agreed that the requirement to have regard to the terms of the existing agreement was one of three significant respects in which an application under Part 5 or under the 1954 Act differed from an application under Part 4, but neither this Tribunal nor the Court of Appeal decided how paragraph 34(12) operated in the context of Part 5 as a whole. I reject the argument that it was part of the ratio of *Ashloch* that paragraph 34(12) of the Code has the same meaning and effect as section 35 of the 1954 Act."

47. Mr Pymont took issue with Fancourt J's reference in paragraph 55 to a "presumption against change", arguing that the applicable principle with section 35 of the 1954 Act is rather that any departure from the existing terms has to be justified by the party seeking it. In practice, however, a variation in terms to the prejudice of the tenant may be hard to justify, the general purpose of the 1954 Act being to protect the business interests of tenants. Be that as it may, though, I agree with Fancourt J that, despite the similarity in language between paragraph 34(12) of the Code and section 35 of the 1954 Act, things said about the latter will not necessarily apply to the former. As Fancourt J said, the 1954 Act and the Code have very different purposes. When considering whether the terms of a new business tenancy should differ from those of its predecessor, the "comparatively weak negotiating position of a sitting tenant" and the purpose of protecting the business interests of the tenant may, as Lord Hailsham indicated in *O'May*, be of significant weight. The Code cannot be said to be aiming to protect site providers in a similar way. To the contrary, as Fancourt J pointed out, the Code seeks to enable operators to "use and exploit sites more flexibly, quickly and cheaply than had previously been the case".

48. That is by no means to say that the terms of an existing code agreement can be ignored. To the contrary, paragraph 34(12) of the Code specifically directs the Court to have regard to the terms of the existing code agreement, albeit that the Tribunal is also required to have regard to a variety of other factors. As Fancourt J said in paragraph 57, paragraph 34(12) "cannot be read as imposing an overarching restriction on change", but in an appropriate case the terms of the existing agreement may still be significant. In particular, where a party wishes the new agreement to contain a term found in the existing agreement, that will be a factor to considered and there will be an onus on the party contending for a change to justify it.

49. The weight to be attached to the fact that a term was included in the existing code agreement will in part turn on its consistency with the aims of the Code. If the relevant term cannot be thought to be in conflict with those aims, the case for replicating it in the new agreement may be compelling. Plainly, the position will be different if the term is at variance with the objectives of the Code. In practice, the terms of a code agreement entered into since the introduction of the Code are more

likely to accord with its purposes than those of an agreement which pre-dates the Code.

50. For completeness, I should record that I do not consider the views expressed in the previous paragraphs to be inconsistent with the ratio of *Ashloch*.

51. Mr Pymont argued that, in the present case, the Tribunal wrongly failed to pay any regard to the terms of the 1999 lease and that, had it done so, it should have concluded that those terms were more in keeping with those proposed by J.H. & F.W. Green than those for which On Tower contended. It was incumbent on On Tower to justify wider rights, Mr Pymont said, and it had not done so.

52. However, J.H. & F.W. Green does not appear to have suggested in its submissions to the Tribunal that the provisions of the 1999 lease as to upgrading and sharing were of relevance, and understandably so. As they stood, those terms were consistent with neither the purposes of the Code nor its terms. Paragraph 17 of the Code gave On Tower automatic upgrading and sharing rights at odds with the 1999 lease and the Code also required the consideration payable to a site provider to be assessed on a "no scheme" basis. In the circumstances, J.H. & F.W. Green argued for On Tower to have narrower rights than had been conferred by the 1999 lease, while On Tower sought more extensive ones. It was common ground that a wholly new form of agreement was appropriate.

53. In the circumstances, there was no need for the Tribunal to refer to paragraph 34(12) in this case. The parties did not suggest that it was of significance, and it was not.

The significance of paragraph 17 of the Code

54. Paragraph 17 of the Code provides for an operator to be entitled to upgrade or share if any changes to the electronic communications apparatus have "no adverse impact, or no more than a minimal adverse impact, on its appearance" and the upgrading or sharing "imposes no additional burden" on the site provider.

55. As already mentioned, the Tribunal saw paragraph 17 of the Code as "operat[ing] as a floor", providing "the minimum rights that an operator is to have". It said in paragraph 25 of its decision that "the imposition of the paragraph 17 conditions is a useful starting point", but considered that "there is no reason to suppose that anything else needs special justification or will be hard to establish".

56. Mr Pymont took issue with the Tribunal's approach. He argued that paragraph 17 of the Code does not merely represent a floor, but sets a benchmark or standard. Parliament has in enacting paragraph 17 struck what it regards as a fair balance between the interests of operators and those of site providers. That is not to say that it is not possible for an operator to apply for and be given more extensive rights, but sufficient justification for doing so must be provided. In that connection, Mr Pymont spoke of "pretty striking circumstances" and "pretty compelling evidence", while saying that he did not wish to hang his hat on either formulation. What matters, he suggested, is that it is recognised that an operator seeking rights going beyond those supplied by paragraph 17 is asking for a departure from the base point determined by Parliament and, as a result, there must be evidence warranting a move away from what Parliament presumed to be appropriate.

57. For his part, Mr Radley-Gardner accepted that the onus is on an operator wishing to have upgrading and sharing rights beyond those for which paragraph 17 of the Code provides to show why they should be conferred. He submitted, however, that the onus is not a heavy one. The operator will need to explain why it requires more, but paragraph 17 is just a starting point.

58. The significance of paragraph 17 of the Code was considered by the Lands Tribunal for Scotland (Lord Minginish and A. Oswald FRICS) in *Cornerstone Telecommunications Infrastructure Ltd v Fothringham* (11 August 2020). There was an issue in that case as to whether sharing rights should be confined to those envisaged in paragraph 17 or should be unrestricted. In the course of its decision, the Lands Tribunal said:

> "20. Assuming, as we do for the purposes of the argument, that the applicants are correct in saying that it is competent for this Tribunal to grant rights which go beyond para 17, and that whether to grant such rights is a matter for our discretion, it would require pretty compelling evidence to justify the imposition on the respondent of rights which could result in a more than minimal adverse impact on the appearance of the mast, or, more importantly, an additional burden which has an adverse effect on his enjoyment of the land or causes him additional (and unquantified) loss, damage and expense.
>
> 21. Paragraph 17 is the only point at which the Code addressed sharing rights. There is no separate provision for infrastructure providers. In enacting it Parliament was striking a balance between the interests of the operators and the public, on one hand, and site providers, on the other. The Tribunal would therefore need to be persuaded that there was some justification for removing the level of protection for site providers which Parliament has provided.
>
> 22. The onus of persuading us should, in our view, be on the applicants …."

59. The Upper Tribunal (Martin Rodger QC, Deputy Chamber President, and Diane Martin MRICS FAAV) took a somewhat different view in *Cornerstone Telecommunications Infrastructure Ltd v London and Quadrant Housing Trust* [2020] UKUT 282 (LC), [2021] L&TR 1 ("*London and Quadrant*"). While the Tribunal said in paragraph 78 that "[t]he onus is on the party wishing to depart from para. 17 to justify its request", it considered that reference to the Law Commission's 2013 report supported "the view that para.17 is intended to reflect the lowest common denominator for sharing and upgrading, a floor rather than a ceiling" (paragraph 69) and concluded that paragraph 17 "represents the irreducible minimum, in terms of upgrading and sharing rights, which an operator is entitled to under a Code agreement" (paragraph 77). The Tribunal continued in paragraph 77:

> "it is open to an operator to ask the Tribunal for unqualified rights, or for a site provider to seek to impose conditions as stringent, but not more stringent, than those in para.17. When

> either party makes such a request the Tribunal must determine what is appropriate having regard to para.23(2)–(8)".

In paragraph 82, the Tribunal said:

> "We do not regard the minimal rights conferred by para.17 as appropriate for an agreement between an infrastructure provider and a site provider for a term of ten years. Both the duration of the agreement and the nature of CTIL's [i.e. the operator's] business are relevant considerations."

60. In the passages from the report to which the Tribunal referred in *London and Quadrant*, the Law Commission addressed the question whether the Code should make special provision to permit sharing and upgrading irrespective of the terms of the agreement with the site provider (see paragraphs 3.32 and 3.33 of the report). The Commission concluded in paragraph 3.39 that "in the majority of cases both the sharing and the upgrading of electronic communications apparatus have serious technical implications" and that this meant that, subject to a specific exception, "they cannot be permitted as a matter of course by way of an ancillary right for Code Operators". With regard to the proposed exception, the Commission said in paragraph 3.48:

> "We think that the situation where sharing or upgrading take place within the confines of a duct, or even of a cabinet on land, without physical or visual impact on the Site Provider, without requiring a power supply or the addition of an antenna for example, and without conferring Code Rights on additional Code Operators, ought to be permitted. These are cases where there is no possible additional burden on the Site Provider and no technical or safety issues."

That situation apart, however, an operator would have to negotiate or apply for sharing or upgrading rights. The Commission said in paragraph 3.42:

> "So in general, it is not possible for Code Operators to have an automatic right to share or to upgrade equipment. Such rights must be negotiated for, or granted by the tribunal; it may be right for there to be additional consideration payable, depending upon the market itself. The same goes for rights to maintain and repair equipment, which cannot be conferred automatically; the range of technical implications, from access to safety to structural integrity, is such that automatic rights cannot be given and it is for the parties to negotiate them or for the tribunal to confer them."

61. These passages lend support to Mr Radley-Gardner's submissions. The Law Commission considered that, exceptionally, an operator could automatically be given rights to share and upgrade where there could be no adverse impact on the site provider, but that the operator would otherwise need to negotiate for or apply for such rights. Nothing in the Commission's report indicates any intention that operators should normally be limited to the rights now given by paragraph 17 of the Code; it

merely shows that the Commission thought that the grant of additional rights should be the subject of specific agreement or decision rather than being automatic. Nor does any different picture emerge from either the Department for Culture Media and Sport's "A New Electronic Communications Code" or the explanatory notes to the Digital Economy Act 2017. "A New Electronic Communications Code" stated that the Government agreed with the Law Commission that "there are some circumstances where it is appropriate for Code operators to upgrade and share apparatus in a way that is unlimited by contractual agreements"; it nowhere said that there was to be any particular limitation on operators seeking wider rights. Further, the ministerial foreword explained that the Government wanted "to put in place modern regulation which fully supports the rollout of digital communications infrastructure" and that the Code was designed to "pave the way for future technological evolution in the coming decades" and would "provide a robust platform to enable long-term investment and development of digital communications infrastructure in the 21st Century". Likewise, the explanatory notes said, among other things, that the 2017 Act "aims to enable access to fast digital communication services for citizens and businesses, to enable investment in digital communications infrastructure, to shape the emerging digital world for the benefit of children, consumers and businesses, and to support the digital transformation of government, enabling the delivery of better public services, world leading research and better statistics" and that the Government "intends infrastructure sharing to assist future deployment of technology such as 5G". Such objectives would be harder to achieve if, for example, operators' sharing rights were usually to be limited to those granted by paragraph 17.

62. In short, I have not been persuaded that the Tribunal's assessment of the significance of paragraph 17 of the Code was other than correct. While paragraph 17 provides a starting point and it is incumbent on an operator seeking more extensive rights to explain why, it need not establish "pretty striking circumstances" or "pretty compelling circumstances". Nor is it the case that an application for wider rights is to be approached on the basis that it is inherently improbable that such rights are appropriate. Each application must be assessed on its particular merits.

63. Mr Pymont argued that, in the present case, there was no sufficient evidence to justify a departure from the upgrading and sharing rights for which paragraph 17 of the Code provides. There was, he said, no specific evidence as to what upgrading On Tower wished to carry out, nor within what timescale. Moreover, the fact that paragraph 17 was assumed not to suffice for On Tower's purposes implied that its upgrading and sharing could have a more than minimally adverse effect on the appearance of the equipment and/or could impose an additional burden on J.H. & F.W. Green. On Tower was thus contending for an unrestricted right to upgrade in unknown ways, and to share, regardless of the consequences to J.H. & F.W. Green, which could potentially be highly damaging. True it may be that the planning regime would impose some limitations on what On Tower might do, but On Tower's desire for flexibility could not make it right to override the protection which a paragraph 17 regime would give J.H. & F.W. Green. Further, it was fanciful to suggest that "without the ability to share the claimant is out of business and cannot fulfil its statutory purpose". There was no evidence demonstrating that the imposition of a term such as J.H. & F.W. Green contended for would be the difference between On Tower staying in or going out of business, having regard to the fact that On Tower has thousands of sites across the country.

64. For his part, Mr Radley-Gardner did not suggest that On Tower had precisely specified the upgrading that it would wish to carry out during the lifetime of the new agreement. The position is rather, he explained, that On Tower needs flexibility to accommodate an uncertain future. The terms of the new 10-year agreement, he argued, have to be such as to allow On Tower to meet (a) unpredictable requirements of network operators, (b) the mid-term roll-out of 5G and (c) the prospect of further technological change. In this connection, Sarah Burrows, an estate surveyor with On Tower, explained in a witness statement that the site at issue is expected to be the subject of upgrading to 5G in approximately 3-5 years' time and that she expected that the existing infrastructure and apparatus would have to be upgraded to facilitate 5G technology and/or another sharer. She also said this:

> "Beyond 5G, it is impossible for [On Tower] (or anyone) to be certain what the future holds for or will otherwise demand from sites (including the Site at Dale Park), in terms of what services they will need to facilitate. However, when having regard to the rate of technological change and improvements since the introduction of 2G technology in 1992 and even since the Site first came to existence in 1999, the pace of change can be expected to accelerate and in ways which can not be fully known at present. To facilitate that unknown, it is therefore important that [On Tower] secure a new agreement that is fit for the future, this means the need for flexibility and the freedom to share the Site and to install and upgrade apparatus and to do so quickly and cheaply. Uncertainty as to what is coming next is simply a feature of the industry which the Code is seeking to facilitate."

65. *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2019] EWCA Civ 1755, [2020] 1 P&CR 15 is noteworthy here. The decision of the Court of Appeal in that case, which at present is under appeal to the Supreme Court, suggests that an operator which is in occupation of land cannot serve a notice under paragraph 20 of the Code in respect of it. That would appear to mean that On Tower could not revert to the Tribunal for additional rights during the currency of the new agreement. Of course, a site provider could confer further rights by agreement, but (to quote paragraph 30 of the Tribunal's decision) "no doubt at a price of its own unhindered by the Code's policy on consideration". In paragraph 55 of its decision, the Tribunal observed that "the requirement to negotiate, outside the protection of the Code (because of the effect of *Compton Beauchamp* …), for permission for every new antenna (etc) would be an expensive and time-consuming burden for [On Tower] to sustain".

66. In all the circumstances, it seems to me that the Tribunal was amply justified in concluding that the new agreement between On Tower and J.H. & F.W. Green should include the terms as to installation, upgrading and sharing sought by On Tower. The Tribunal took account of J.H. & F.W. Green's concerns, but considered the alarm "exaggerated" and that there would be "ample protections in the agreement, combined with the control exercised by the local planning authority and the extra protection afforded in the National Park"; the agreement and planning law, the Tribunal said, "provide the protection that [J.H. & F.W. Green] needs from the levels of nuisance

and disturbance that can realistically be anticipated". Further, the Tribunal was fully entitled to take the view that On Tower had sufficient reason for wanting the terms it proposed. There was evidence supporting the Tribunal's assessment that a limit on equipment or upgrading would cause On Tower "extensive" difficulties and that "the advance of technology creates a practical need" for On Tower, and, as the Tribunal noted, "[On Tower's] evidence of the public benefit of what it seeks is unchallenged". While, moreover, inability to share this particular site might not be fatal to On Tower, the Tribunal was obviously correct to see ability to share as key to On Tower's business as a neutral host. Uncertainty as to the future is, here, not a bar to On Tower being given the rights it asks for but, to the contrary, affords a compelling basis to accede to its application. There was very good reason to give On Tower upgrading and sharing rights beyond those for which paragraph 17 of the Code provides.

Conclusion

67. I would dismiss the appeal.

Lord Justice Dingemans:

68. I agree.

Lady Justice Whipple:

69. I also agree.